

①  
**88-2043**

Office - Supreme Court, U.S.
<b>FILED</b>
<b>JUN 13 1984</b>
ALEXANDER L. STEVENS.
CLERK

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

---

BENJAMIN LONZO WILLIS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

---

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

PETITION FOR WRIT OF CERTIORARI

---

NORMAN SEPENUK  
1330 Bank of California Tower  
707 S.W. Washington Street  
Portland, Oregon 97205  
Telephone: (503) 221-1633

JAMES L. COLLINS  
1330 Bank of California Tower  
707 S.W. Washington Street  
Portland, Oregon 97205  
Telephone: (503) 295-2050

29 pp



QUESTION PRESENTED

Whether a substantial connection must be shown between currency sought to be forfeited and the underlying activity in controlled substances before the currency is subject to forfeiture under 21 U.S.C. § 881(a)(6).



TABLE OF CONTENTS

OPINION BELOW . . . . .	1
JURISDICTION . . . . .	2
QUESTION PRESENTED . . . . .	2
STATUTE INVOLVED . . . . .	2
STATEMENT OF THE CASE . . . . .	3
REASONS FOR GRANTING THE WRIT . . . . .	5
(1) The Conflict of Standards in the Court of Appeals . . . . .	5
(2) The Question Presented Is One of Exceptional Importance in the Administration of the Forfeiture Laws . . . . .	10
CONCLUSION . . . . .	15
APPENDIX A . . . . .	A-1
APPENDIX B . . . . .	B-1

TABLE OF AUTHORITIES

<u>United States v. 1964 Beechcraft</u> <u>Baron Aircraft</u> , 691 F.2d 725 (5th Cir. 1982) . . . . .	9, 10
<u>United States v. \$2,500 in United</u> <u>States Currency</u> , 689 F.2d 10 (2d Cir. 1982) . . . . .	12
<u>United States v. \$22,287.00 in U.S.</u> <u>Currency</u> , 709 F.2d 442 (6th Cir. 1982) . . . . .	12

<u>United States v. \$64,000 in U.S.</u> <u>Currency, 722 F.2d 239</u> <u>(5th Cir. 1984) . . . . .</u>	9
<u>United States v. \$88,500.00 in United</u> <u>States Currency, 671 F.2d 293</u> <u>(8th Cir. 1982) . . . . .</u>	12
<u>United States v. \$364,960 in United</u> <u>States Currency, 661 F.2d 319</u> <u>(5th Cir. 1981) . . . . .</u>	12

STATUTES

21 U.S.C. § 881 . . . 2, 3, 5, 10, 11, 13
28 U.S.C. § 1254 . . . . . 2

SECONDARY AUTHORITIES

1978 U.S. Code Cong. and Ad. News, 9518 . . . . . 6
"Asset Forfeitures," General Accounting Office Report to Hon. Joseph R. Biden, Chairman, Senate Subcommittee on Criminal Justice, December 27, 1979 . . . . . 8

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

---

BENJAMIN LONZO WILLIS, Petitioner

v.

UNITED STATES OF AMERICA, Respondent.

---

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

Petitioner, Benjamin Lonzo Willis,  
prays that a Writ of Certiorari be issued  
to review the opinion and judgment of the  
United States Court of Appeals for the  
Ninth Circuit, entered April 10, 1984,  
which reversed the judgment of the United  
States District Court for the District of  
Oregon.

OPINION BELOW

The opinion of the Court of Appeals  
is reported at 730 F.2d 571 (9th Cir.  
1984) (see Appendix A, infra). The

Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 24, 1984. (See Appendix B, infra.)

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether a substantial connection must be shown between currency sought to be forfeited and the underlying activity in controlled substances before the currency is subject to forfeiture under 21 U.S.C. § 881(a)(6).

STATUTE INVOLVED

21 U.S.C. § 881(a)(6), provides in pertinent part:

(a) The following shall be subject to forfeiture to the United States and no property rights shall exist in them;

(6) All monies . . . furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter . . . .

STATEMENT OF THE CASE

The United States Attorney for the District of Oregon brought this in rem action seeking forfeiture to the United States pursuant to 21 U.S.C.

§ 881(a)(6). The Honorable James Redden, United States District Court Judge for the District of Oregon, denied the government's motion for summary judgment and granted claimant's cross-motion for summary judgment on April 5, 1983. On April 10, 1984, the Ninth Circuit (Judges Schroeder, Farris and Reinhardt) reversed the District Court's grant of summary judgment to the claimant and ordered that summary judgment in favor of the government be granted. Claimant's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on May 24, 1984. The background of the underlying transaction was set forth by the Court of Appeals as follows:

This proceeding originated in an arrest of a drug dealer by Drug Enforcement Administration agents and the subsequent interception of a package sent to him. Inside the package were cocaine, heroin and items of false identification, including a birth certificate with the claimant's fingerprints on it. Agents obtained a search warrant and searched claimant's house. In an office-garage they found bullets, powder scales, glassine bags, and a zip-loc bag with cocaine residue in it that had been thrown into a wood stove. In the same room they found \$90,185 in a floor safe and \$3,500.61 in a box.

The government sued for forfeiture of the money under 21 U.S.C. § 886(a)(6), alleging that it "had been furnished and was intended to be furnished in exchange for heroin and cocaine."

United States v. \$93,685.61, supra, at

730 F.2d 571-72.

The District Court after analyzing the evidence held that

the government has not met its burden of proving a substantial connection between the currency and illegal drug transactions. I, therefore, deny the government's motion for summary judgment and grant claimant's cross motion.

Dist. Ct. Opinion at p. 7, C.R. 40. In

so holding, the Court noted that the government did not supply "any evidence that the claimant [was] currently involved in the distribution of controlled substances." C.R. 40 at p.

7. In reversing the judgment of the District Court and entering summary judgment for the government, the Court of Appeals held that "[c]ircumstantial evidence, particularly the presence of the drug paraphrenalia, is sufficient here to establish probable cause."

United States v. \$93,685.61 in U.S.

Currency, supra, at 572.

REASONS FOR GRANTING THE WRIT

- (1) The Conflict of Standards in the Courts of Appeals

The forfeiture of money and monetary instruments under 21 U.S.C. § 881 has only been permitted since November 10, 1978. The statute, prior to that time, applied to the controlled

substances themselves, conveyances and containers used to facilitate their transfer, books, records, formulas, raw materials and equipment used to manufacture, deliver, import or export the substances. The 1978 legislative history and commentaries made it clear that a "substantial connection" must exist between the currency and the underlying narcotics transactions to permit forfeiture. As was stated in the joint explanatory statement of Title II and III, reprinted in 1978 U.S. Code Cong. and Ad. News, 9518, 9522:

Due to the penal nature of forfeiture statutes, it is the intent of these provisions that property would be forfeited only if there is a substantial connection between the property and the underlying criminal activity which the statute seeks to prevent. Specifically, the Senate amendment provides for the forfeiture of property exchanged or intended to be exchanged in an illegal drug transaction. In addition it provides for forfeiture of property which is the proceeds of an illegal

drug transaction only if there is a traceable connection [between] such property and the illegal exchange of controlled substances. Thus, if such proceeds were, for example, commingled with other assets, involved in intervening legitimate transactions, or otherwise changed in form: they would still be subject to forfeiture, but only to the extent that it could be shown that a traceable connection to an illegal transaction in controlled substances existed. Similarly, any moneys, negotiable instruments, or securities that were used or intended to be used to facilitate any violation of the Controlled Substances Act would be forfeitable only if they had some substantial connection to, or were instrumental in, the commission of the underlying criminal activity which the statute seeks to prevent.

(Emphasis added.) In short, Congress clearly intended to require the Government to establish a substantial connection between the currency and the underlying violation that the statute is meant to remedy.

Similarly, a report by the General Accounting Office to the Hon. Joseph R. Biden, Chairman, Senate Subcommittee on

Criminal Justice, dated December 27, 1979, and entitled "Asset Forfeitures -- A Seldom Used Tool in Combating Drug Traffic" discussed the extent of tracing required for a successful forfeiture.

Derivative contraband, such as automobiles, boats, and aircraft used to facilitate an exchange of contraband, is ordinarily seized at the time of the arrest along with the contraband exchanged. As a consequence, extensive financial expertise is not required to establish a connection to the illegal activity. Direct proceeds [property such as cash that is received in exchange or as payment for any of a variety of transactions involving contraband], however, may require a greater degree of financial expertise unless the actual exchange of proceeds for contraband is observed. For example, even though illegal drugs and cash are found in the same location, forfeiture of the cash cannot be realized unless a connection to the drugs can be established.

(Emphasis added.)

Prior to the Ninth Circuit's decision in this case, those courts which had addressed the issue concluded that a

"substantial connection" was required between the currency to be forfeited and the underlying narcotics transactions.

The Fifth Circuit held that

under § 881(a)(6), the government must show "probable cause for belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute;" i.e., the exchange of the controlled substance.

United States v. \$364,960 in United States Currency, 661 F.2d 319, 323 (5th Cir. 1981); see also, United States v. \$64,000 in U.S. Currency, 722 F.2d 239, 244 (5th Cir. 1984).

The Fifth Circuit further supported the Congressional recognition that money could be from non-drug sources and thus required a more stringent connection requirement in United States v. 1964 Beechcraft Baron Aircraft, 691 F.2d 725 (5th Cir. 1982). There, the Court noted that the distinction in the legislative

history required a showing of a "substantial connection" in the case of currency forfeitures which is not required in a vehicle forfeiture. Id. at 727.

The Ninth Circuit in deciding this case made no findings or mention of the substantial connection requirement, even though it was addressed both by the appellant and the appellee in the briefs. The failure to address the issue of the substantial connection requirement was the basis for a request for a rehearing which was denied. Certiorari should be granted to resolve this apparent conflict between the circuits and to define the appropriate standard to be applied in currency forfeiture cases under 21 U.S.C. § 881(a)(6).

(2) The Question Presented Is One of Exceptional Importance in the Administration of the Forfeiture Laws.

With increasing frequency, the District Courts and Courts of Appeals are required to determine whether currency is forfeitable under the provisions of 21 U.S.C. § 881(a)(6). In the instant case, the Ninth Circuit held that

The government can show probable cause for a belief that the currency is subject to forfeiture based on a reasonable ground for belief that the currency was furnished or intended to be furnished in exchange for drugs. This belief must be more than mere suspicion, but can be created by less than *prima facia* proof.

United States v. \$93,685.61 In U.S.

Currency, supra, at 572 (citation omitted). Neither the Ninth Circuit in its opinion nor any other Courts of Appeal to our knowledge has ruled on the important question of how the "substantial connection" requirement relates to the government's burden of proof in a currency forfeiture proceeding. The Ninth Circuit held that

the "aggregate of facts" in this case gives rise to "more than mere suspicion that the currency was furnished or intended to be furnished in exchange for drugs." Id. at 572. The court relied on the large amount of money found in the household itself, in combination with other circumstantial evidence, particularly the presence of drug paraphernalia, to establish probable cause. We know of no case where such a thin showing has sustained a finding of probable cause. The four cases cited by the Court to support its holding<sup>1</sup> each involved significant evidence of recent

- 
1. United States v. \$88,500.00 in United States Currency, 671 F.2d 293 (8th Cir. 1982); United States v. \$364,960.00 in United States Currency, 661 F.2d 319 (5th Cir. 1981); United States v. \$2,500 in United States Currency, 689 F.2d 10 (2d Cir. 1982); United States v. \$22,287.00 in U.S. Currency, 709 F.2d 442 (6th Cir. 1982).

drug trafficking by claimants who were arrested on narcotics charges at the time. In this case, as the District Court stated, "The government has not supplied any evidence that the claimant is currently involved in the distribution of controlled substances." C.R. 40, p.

7. The only documented drug transactions engaged in by claimant were in August and September of 1978, four years before the government seized the currency and prior to the time that currency was forfeitable under 21 U.S.C. § 881(a)(6). While the circumstantial evidence cited by the Court may well provide more than mere suspicion that the claimant was involved in narcotics activity, it did nothing, as the trial court noted, to show a "substantial connection" between the currency and its being furnished or intended to be furnished for a narcotics transaction. C.R. 40 at pp. 7-9.

In our view, this case presented a showing by the government of nothing more than "mere suspicion"<sup>2</sup> which now has been converted by the Ninth Circuit into a finding of probable cause. We note this, not simply to argue an injustice in our own case, but rather to suggest that the Ninth Circuit's opinion gives authorities a virtual license to seize currency despite the absence of an identifiable drug transaction. That was not the Congressional intent and raises significant due process questions. In any event, with increasing numbers of currency forfeiture cases arising in the country, it is important to provide some guidelines concerning the proper interpretation of the "substantial

- 
2. The District Court referred to the government's approach as arguing "where there's smoke, there's fire." CR 40, p. 9.

connection" requirement and its relationship to the government's burden of proof.

CONCLUSION

For the reasons stated, this Writ should be granted and judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

NORMAN SEPENUK

JAMES L. COLLINS

  
\_\_\_\_\_  
Norman Sepenuk  
Attorney for Petitioner

APPENDIX A  
A-1

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	No. 83-3861
Plaintiff-Appellant,	)	
	)	OPINION
v.	)	
	)	
\$93,685.61 IN U.S. CURRENCY,	)	
	)	
Defendant,	)	
	)	
BENJAMIN LONZO WILLIS,	)	
	)	
Claimant-Appellee.	)	
	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

James A. Redden, District Judge, Presiding  
Argued and Submitted March 9, 1984

Before: SCHROEDER, FARRIS, AND REINHARDT,  
Circuit Judges.

PER CURIAM:

The government appeals a district court's grant of summary judgment to the claimant in a currency forfeiture case. The judgment was based on a conclusion that the government had failed to meet its burden of showing probable cause to institute forfeiture proceedings. This

proceeding originated in an arrest of a drug dealer by Drug Enforcement Administration agents and the subsequent interception of a package sent to him. Inside the package were cocaine, heroin and items of false identification, including a birth certificate with the claimant's fingerprints on it. Agents obtained a search warrant and searched claimant's house. In an office-garage they found bullets, powder scales, glassine bags, and a zip-loc bag with cocaine residue in it that had been thrown into a wood stove. In the same room they found \$90,185 in a floor safe and \$3,500.61 in a box.

The government sued for forfeiture of the money under 21 U.S.C. § 886(a)(6), alleging that it "had been furnished and was intended to be furnished in exchange for heroin and cocaine." The government contended that

probable cause for forfeiture existed based on the following: (a) an anonymous tip to a Drug Enforcement Administration agent that the claimant was engaged in drug transactions currently; (b) claimant's documented involvement in drug transactions in 1978; (c) claimant's fingerprints on the intercepted birth certificate; (d) the fact that the amount of cash found in a search of claimant's home was so large; (e) the drug paraphernalia found in the same room as the money; (f) absence of evidence during the search that the claimant engaged in any legitimate employment; (g) claimant's failure to file tax returns; (h) rifles found in the claimant's house.

The government can show probable cause for a belief that the currency is subject to forfeiture based on a reasonable ground for belief that the

currency was furnished or intended to be furnished in exchange for drugs. This belief must be more than mere suspicion, but can be created by less than *prima facie* proof. United States v. One 56-Foot Yacht Named Tahuna, 702 F.2d 1276, 1281-82 (9th Cir. 1983). We review the district court's probable cause determination in a forfeiture proceeding as a question of law. United States v. One Twin Engine Beech Airplane, 533 F.2d 1106, 1109 (9th Cir. 1976).

The district court erred when it found an insufficient showing of probable cause in this case. Circumstantial evidence of drug transactions is sufficient to support the establishment of probable cause in a forfeiture proceeding. United States v. \$364,960 in United States Currency, 661 F.2d 319, 324 (5th Cir. 1981). The

aggregate of facts in this case gives rise to "more than mere suspicion" that the currency was furnished or intended to be furnished in exchange for drugs.

The extremely large amount of money found in the household itself is strong evidence that the money was furnished or intended to be furnished in return for drugs. United States v.

\$2,500 in United Statse Currency, 689 F.2d 10, 16 (2d Cir. 1982); \$364,960, 661 F.2d at 324. The money, in combination with other persuasive circumstantial evidence, particularly the presence of the drug paraphernalia, is sufficient here to establish probable cause. See also United States v.

\$22,287, United States Currency, 709 F.2d 442 (6th Cir. 1983) (money, heroin, powder scales, guns, found in search after drug sale arrests); United States v. \$83,500 in United States Currency and

\$40 in Canadian Currency, 671 F.2d 293 (8th Cir. 1982) (money found on scene of drug sale). Because we believe that the uncorroborated tip that claimant was involved presently in drug transactions is unnecessary to a finding that probable cause exists in this case, we do not address claimant's arguments concerning retroactive application of the analysis of Illinois v. Gates, 103 S. Ct. 2317 (1983).

The burdens of proof applicable to forfeiture proceedings, 19 U.S.C. § 1615, require that if the government succeeds in showing probable cause to institute forfeiture, the burden shifts to the claimant to prove by a preponderance of the evidence that the item was not furnished or intended to be furnished in exchange for a controlled substance. See Tahuna, 702 F.2d at 1281. The claimant here has indicated

that he intends to present no evidence to rebut the government's case.

Therefore, the judgment of the district court is reversed, and summary judgment in favor of the government is ordered.

Reversed and remanded for entry of judgment in favor of the government.



APPENDIX B  
B-1

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, )  
Plaintiff-Appellant, ) No. 83-3861  
v. ) ORDER  
\$93,685.61 IN U.S. CURRENCY,)  
Defendant, )  
BENJAMIN LONZO WILLIS, )  
Claimant-Appellee. )  
\_\_\_\_\_

BEFORE: SCHROEDER, FARRIS, and REINHARDT,  
Circuit Judges

The panel as constituted above has  
voted to deny the petition for rehearing  
and to reject the suggestion for  
rehearing en banc.

The full court has been advised of  
the suggestion for rehearing en banc,  
and no judge of the court has requested  
a vote on the suggestion for rehearing  
en banc. Fed. R. App. P. 35(b).

The petition for rehearing is

B-2

denied and the suggestion for rehearing  
en banc is rejected.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for a Writ of Certiorari to the Court of Appeals for the Ninth Circuit on the counsel for respondent by enclosing three copies thereof in an envelope, postage prepaid, addressed to:

The Solicitor General of the  
United States  
Department of Justice  
Washington, D.C. 20530

and depositing the same in the United States mails at Portland, Oregon, on June 11, 1984, and further certify that all parties required to be served have been served.

  
Norman Sepenuk  
Of Attorneys for Petitioner